No. 961239 DEC 4 1996

OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

DAVID SMITH NUNES - PETITIONER

VS.

THE FLORIDA BAR - RESPONDENT

Petition For Writ Of Certiorari

To The Supreme Court of Florida

PETITION FOR WRIT OF CERTIORARI

DAVID SMITH NUNES
3917 NORTH ANDREWS AVENUE
FORT LAUDERDALE, FL 33309
(954) 561-2023

48 pp

QUESTIONS PRESENTED

1. WHETHER THE SUPREME COURT OF THE STATE OF FLORIDA HAS JURISDICTION TO REGULATE FEDERAL RULES OF CRIMINAL IMMIGRATION PRACTICE IN VIOLATION OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION?

2. WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS OF THE UNITED STATES SHOULD GRANT RECIPROCITY TO A STATE SUPREME COURT ATTORNEY SUSPENSION IF THE UNDERLYING REASON FOR THE SUSPENSION IS TIED INTO THE STATE'S ATTEMPT TO REGULATE FEDERAL IMMIGRATION PRACTICE?

3. WHETHER THE JUSTICES OF THE SUPREME COURT OF FLORIDA ARE COMPETENT TO REVIEW ANY COMPLICATED FEDERAL CRIMINAL IMMIGRATION PRACTICE AND PROCEDURE ISSUES?

4. WHETHER OR NOT DUE PROCESS IS VIOLATED WHERE THE STATE BAR IS INTEGRATED WITH THE STATE'S HIGHEST COURT, WHEREIN THE STATE'S HIGHEST COURT IS MERELY AN ALTER EGO OF THE STATE BAR AND MERELY RUBBER STAMPS THE STATE BAR'S DECISION?

LIST OF ALL PARTIES

The following is a list of all parties to the proceeding before the Florida Supreme Court:

1. David Smith Nunes, Respondent in the Supreme Court of Florida; Petitioner in the United States District Court for the Eleventh District of the United States.

2. The Florida Bar, Complainant in the Supreme Court of Florida; Respondent in the United States District Court for the Eleventh District of the United States.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF ALL PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
Cases	iv
Constitutions and statutes	iv
OPINIONS AND ORDERS BELOW	1
JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	4-5
ARGUMENT AND AUTHORITY	6
CONCLUSION	7

TABLE OF AUTHORITIES

Cases Page

Matter of GABRYELSKY,
Int. Dec. 3212, 20 I&N Dec. (1991)..... 8

Constitutions and Statutes

U.S. Const., Amend. XIV..... 9

INA § 212(h)..... 10

INA § 212(c)..... 10

INA § 212(a)(2)(A)(i)(II)..... 10

OPINIONS AND ORDERS BELOW

The following orders and opinions have been entered by the Courts below:

1. DECISION OF THE SUPREME COURT OF FLORIDA. 21 F.L.W. S319, CASE NO. 85,451. (App. I)

2. COMPOSITE OF EXHIBITS: (App. II)
   INS INTENT TO REVOKE
   RESPONSE BY PETITIONER
   APPROVAL OF VISA PETITION

3. EMERGENCY PETITION FOR REVIEW AND STAY IN THE UNITED STATES DISTRICT COURT FOR THE ELEVENTH DISTRICT OF THE UNITED STATES. (App. III)

4. MATTER OF GABRYELSKY. (App. IV)

JURISDICTION

The Florida Supreme Court decision was rendered on July 18, 1996. A copy of that decision appears at Appendix A. A timely motion for rehearing was thereafter denied on September 12, 1996, thereby extending the 90 days filing period. Jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

Jurisdiction is also invoked pursuant to 28 U.S.C. § 1254(1), whereby and appeal is pending in the United States District Court for the Eleventh District of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the United States Constitution, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is an action brought by the Florida Bar (hereinafter "Respondent") under the direction of the Supreme Court of Florida on July 18, 1996, pursuant to Article V. § 15, Fla. Const., alleging that Mr. David Smith NUNES (hereinafter "Petitioner") violated the rules of Federal Criminal Immigration Procedure. The Supreme Court of Florida ordered Petitioner suspended from practicing law for ninety (90) days, effective Sunday the 18th of August, 1996. The suspension was premised on the following two criminal immigration matters:

1. The Petitioner was retained to stop the deportation of an alien convicted of armed robbery and aggravated assault on a police officer. The father of the alien retained the services of the Petitioner while the alien was on route to the airport to be deported. The alien was the stepson of a United States Citizen, as such, he was eligible for 212-H relief. The Petitioner filed a motion to reopen and a stay of deportation before the immigration judge. The deportation was stopped and the alien was returned to Oakdale, LA, where he had been previously incarcerated. The Florida Bar contends that since the petitioner did not seek relief from the District Director, he was incompetent and any fee paid to him by the father would therefore be excessive. The Petitioner utilized the Federal Criminal Immigration Procedure to apply for a 212-H waiver and the deportation of the alien was stopped by the Petitioner for two and one half months; and the alien requested that in lieu of further imprisonment, he be sent to his home. The Florida Bar contends that the procedure utilized by the Petitioner was improper and showed incompetency.

For instance, the Florida Bar's position is that the filing of a relative petition for 212-H adjustment of status was redundant; and as such demonstrated incompetence because there was no such thing as a 212-H waiver. The fee paid was $1,400.00, $750.00 of which went to the emergency filing of a Motion to Reopen and Appeals to the Board of Immigration Appeals, and the adjustment of status Petitions.

2. The Petitioner was retained to obtain reinstatement of an alien's green card. The alien was deported for simple possession of cocaine and having been in the United States previously for more than seven years, he was eligible for 212-C non pro tunc relief. The initial application for the reinstatement of the green card was denied and a grievance was filed with the Florida Bar. Subsequent to the hearing before a referee, the INS service issued a Notice of Intent to Deny, the file having been sent back from London where the denial took place.

The Florida Bar admitted that the Notice of Intent to Revoke was sent by the immigration and naturalization service after the final hearing before the referee; and that Mr. Nunes also filed his response subsequent to the final hearing before the referee. The Petitioner filed a response in rebuttal to the Notice of Intent to Deny. The Petitioner also requested that he be given the opportunity to be heard on the newly discovered evidence and that this request was denied. The reinstatement of Mark Burton's immigrant visa/green card was also subsequent to the final hearing before the referee and subsequent to the Supreme Court of Florida's Order of Suspension.

INS' notice of Intent to revoke (copy attached hereto with section highlighted) shows that Mark Burton was not deported for possession of cocaine, he was sent out of the United States as an excludable alien under Section 212(a)(2)(A)(i)(II). The notice also stated that the Consular Officer at the American Embassy in London returned the petition and supporting documents to the INS for further disposition.

The Florida Bar contended that there was no such thing as a 212-C non pro tunc relief and on page 7 of their brief states: "Mr. Brauwerman testified that the petition was simply being returned to INS **because the visa could never be granted**." Those misrepresentations of facts and law were what the referee relied on in making his decision which has now been proven to be totally false. The Petitioner was never given the opportunity to present the exculpatory evidence and thereby was denied his due process rights.

ARGUMENT AND AUTHORITY

The reason that this writ should be granted is that it is a question of great public concern affecting not only the Petitioner, but all criminal immigration practitioners in regards to fees and the procedure in which criminal immigration should be practiced.

The Supreme Court of the State of Florida in its attempt to regulate the rules of criminal immigration practice is violating the Supremacy Clause of the United States Constitution.

Reciprocity to a state Supreme Court suspension of license to practice law should not be given if the underlying reason for the suspension is tied to the state's attempt to regulate federal immigration practice and procedure.

The judges of the Supreme Court of Florida are not competent to review and decide complicated federal criminal immigration practice and procedure issues.

The Supreme Court of the State of Florida violated the Constitutional right of the Petitioner in not reopening the case before the referee, so as to give the Petitioner the opportunity to be heard and present exculpatory evidence; instead of acting as an alter ego of the state bar and merely rubber stamping any decision made by the state bar.

CONCLUSION

An attorney's right to practice law is property. No state should be able to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. The Supreme Court of the State of Florida is no exception. The Supremacy clause preempts any power and jurisdiction of a state and the Supreme Court of the State of Florida should not be made an exception wherein it can choose any area of law, both federal and state, and regulate the practice and procedure thereof. Federal law implicitly, under criminal immigration rules, gives 212-H relief to an alien convicted of weapons charges. Federal law also gives the relief of 212-C for aliens convicted of drug charges. (See Matter of Gabryelsky Int. Dec. 3212, 20 I&N Dec. (1991) - Copy attached hereto))

The Supreme Court of Florida cannot blatantly overrule these federal rules nor should they be allowed to dictate the procedure that a practitioner should utilize in obtaining that relief for their client. How can state courts be permitted to rule on the procedures of federal practice when they can not even interpret federal laws? In deciding the amount of the attorney's fees they are not only violating the Federal Trade Commission Act, but their acts and conduct has a chilling effect on all immigration practitioners. The case has been cited and placed in the law books without even mentioning the success of the Petitioner. Since the first alien deportation was aborted by the attempts made by the Petitioner, the avenues taken should have been of no relevance. The approval of the 212-C non pro tunc relief which was granted by the United States Department of Justice clearly mooted the Supreme Court of Florida's decision.

The Writ of Certiorari should be granted and both The Florida Bar and The Florida Supreme Court should show cause why the conviction should not be overturned, his record should be expunged, and damage and costs awarded to the Petitioner.

APPENDIX I

NO. 85,451
SUPREME COURT OF FLORIDA
July 18, 1996

THE FLORIDA BAR, COMPLAINANT,
V.
DAVID SMITH NUNES, RESPONDENT

Petitioner's Motion to Compel Referee to Reopen Proceedings; Motion for Relinquishment of Jurisdiction, and Motion for Relief from Judgment are hereby denied.

A True Copy JB

TEST:

/s/ Sid J. White
Sid J. White
Clerk Supreme Court

cc: Mr. David S. Nunes
Mr. Peter Ticktin
Ms. Ronna Friedman Young
Hon. Howard Berman
Mr. John F. Harness, Jr.
Mr. John A. Boggs
Mr. John T. Berry
Mr. Theodore H. Fulton

SUPREME COURT OF FLORIDA

NO. 85,451

THE FLORIDA BAR,

COMPLAINANT,

vs.

DAVID SMITH NUNES,

RESPONDENT.

[July 18, 1996]

PER CURIAM.

We have for review the complaint of The Florida Bar (the Bar) and the Referee's report regarding alleged ethical breaches by David Smith Nunes. We have jurisdiction. Art. v, § 15, Fla. Const. We approve the report.

The referee made the following findings of fact pursuant to the Bar's four-count complaint:

As to Count I

....

2. In or about November 1993, Gloria and Leon Burton retained Respondent to obtain lawful, permanent residence in the United States for their son, Mark Burton.

3. In or about December 1988, Mark Burton was deported from the United States based upon a criminal conviction for the possession of cocaine, a controlled substance.

....

5. Respondent undertook the representation for a

fee of approximately $1,875.00 plus a $350 fee for Freedom of Information Act filings.

6. Respondent had knowledge of Mark Burton's criminal conviction and prior deportation.

7. Respondent advised Gloria and Leon Burton that Mark Burton was eligible for a "green card" which would entitle him to lawful, permanent residence in the United States.

....

9. According to the unrebutted testimony of JEFFREY N. Brauwerman, a former U.S. Immigration Judge who has served as Regional Counsel of the Southern Region of the Immigration and Naturalization Service ("INS") and as District Counsel for the District of Miami of the INS, there is absolutely no way to obtain an immigrant vis a or green card for an alien with a cocaine conviction....

10. According to the unrebutted testimony of Bruce MARMAR, the Senior Immigration Examiner for the INS in Miami, there are no procedures available for someone in Mark Burton's position that would lead to the obtaining of a green card because a person who has been convicted in the United States for possession of cocaine is permanently barred from permanent residence.

....

17. Based upon the above, I find by clear and convincing evidence that a reasonably competent attorney would recognize that Mark Burton was not eligible for lawful, permanent residence in the United States and would decline to represent the Burtons in this regard.

<u>As to Count II</u>

....

20. Mr. Brauwerman further testified that a reasonably competent attorney would have had a thirty-minute to forty-five-minute consultation with the Burtons and based on the facts would explain to them as simply as possible that there was no

provision for the issuance of an immigrant visa under the facts presented by the Burtons to the attorney.

21. Mr. Brauwerman stated that a proper consultation would have ended with, "I'm sorry, I just really can't help your son."

22. Based upon the above, I find by clear and convincing evidence that Mark Burton was not eligible for lawful, permanent residence in the United States and Respondent failed to explain this fact to the Burtons to the extent reasonably necessary to permit them to make informed decisions regarding the representation.

As to Count III

....

25. Mr. Brauwerman further testified that "in this particular case, since it was black letter law that there was no relief available, then the fees I guess by definition would become excessive. [Q] Clearly excessive? [A] Clearly excessive under these facts."

....

27. Based upon the above, I find by clear and convincing evidence that the fees charged by the Respondent in connection with the representation of Mark Burton were clearly excessive.

As to Count IV

28. In or about March 1993, Robert Whynes retained Respondent to stop the pending deportation of his son, Dennis.

29. Robert Whynes paid Respondent a total of $1,400 in connection with the representation.

30. According to the unrebutted testimony of Mr. Brauwerman, a reasonably competent attorney representing Dennis Whynes would have immediately filed an "I-246" form which is an application for a stay of deportation the District Director of the

INS. Mr. Brauwerman further testified that a reasonably competent attorney would attempt to physically bring a copy of the I-246 to Assistant District Director of the INS, Kenneth Powers, who usually makes the final decisions on whether or not to take somebody off an airplane, stop an airplane or stop them in transit on the way to the airport.

....

36. Based upon the above, I find by clear and convincing evidence that Respondent failed to provide competent representation in the Whynes case by not filing an "I-246" form (application for stay of deportation) with the INS and by failing to request an audience with the Assistant District Director of the INS or anyone in the Deportation Branch of the local INS office.

The referee made the following recommendations of guilt and discipline.

As to Count I

I recommend that Respondent be found guilty and specifically that he be found guilty of violating Rule 4-1.1 of the Rules of Professional Conduct, to wit: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

As to Count II

I recommend that Respondent be found guilty and specifically that he be found guilty of violating Rule 4-1.4(b) of the Rules of Professional Conduct, to wit: A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

As to Count III

I recommend that Respondent be found guilty and specifically that he be found guilty of violating

Rule 4-1.5(a) of the Rules of Professional Conduct, to wit: An attorney shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee.

As to Count IV

I recommend that Respondent be found guilty and specifically that he be found guilty of violating Rule 4-1.1 of the Rules of Professional Conduct, to wit: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

IV. Recommendation as to Disciplinary Measures to be Applied:

....

Therefore, in accordance with the above, I recommend that Respondent be suspended for a period of ninety (90) days and for an indefinite period thereafter until Respondent shall pay the cost of these proceedings and make restitution to his clients, Gloria and Leon Burton, in the amount of $2,225 as provided in Rule 3-5.1(i). Furthermore, upon reinstatement, I recommend that Respondent be placed on probation for a period of one (1) year to run concurrently with any unserved probation remaining from Case No. 84,097 as of the date of reinstatement in the case sub judice.

During this one year of probation, respondent shall be required to complete twenty-five (25) hours of continuing legal education consisting of twenty (20) hours in the area of immigration law and five (5) hours in the area of ethics.

The cost of continuing legal education shall be borne by Respondent. Proof of completion of the continuing legal education shall be submitted by Respondent to the Bar's Tallahassee headquarters. Failure to complete the continuing legal education within one year of reinstatement or to submit proof within that time shall be caused to revoke probation.

Nunes contends that his handling of both the

Burton and Whynes matters was reasonable. Competent substantial evidence in the record, however, supports the referee's findings that Nunes's actions were incompetent and futile--both Brauwerman and Marmar testified to that effect. We approve the Referee's findings of fact and conclusions of guilt. **See Florida Bar v. MacMillan**, 600 So. 2d 457 (Fla. 1992) (a referee's findings will be approved when supported by competent substantial evidence).

Nunes contends that the recommended discipline is excessive. We disagree for three reasons. First, Nunes's representation in both the Burton and Whynes cases was clearly incompetent, as Brauwerman and Marmar attested to.. Second, both Burton and Whynes were prejudiced by Nunes's actions: Burton expended time, effort, and several thousand dollars in a futile effort to win residency for his son, and Whynes was deprived of any reasonable chance of interdicting his son's deportation. And finally, the clients were exploited--whether deliberately or not--by Nunes for his own financial gain. In the Burton case in particular, Nunes extracted a hefty fee for services that virtually every practitioner in the field knows cannot be rendered ("I mean that's the first thing law clerks learn," Brauwerman testified).

In light of the above and considering Nunes's prior disciplinary record[1], we find the recommended discipline appropriate. **cf. Florida Bar v. Lawless**, 640 So. 2d 1098 (Fla. 1994) (ninety-day suspension appropriate for deficient representation in immigration matter where lawyer had prior disciplinary record). We approve the referee's report in its entirety.

David Smith Nunes is hereby suspended from the practice of law in Florida for ninety days and thereafter until he repays Burton $2,225. Upon reinstatement, Nunes shall be placed on probation

---

[1]Nunes was given a private reprimand in 1986 and a public reprimand and 10-day suspension in 1995 for sending to opposing counsel's client a letter criticizing opposing counsel's handling of the case. **See Florida Bar v. Nunes**, 661 So. 2d 1202 (Fla. 1995).

for one year, which probation shall run concurrently with any unserved probationary period remaining in **Florida Bar v. Nunes**, 661 So. 2d 1202 (Fla. 1995). During this one-year period, Nunes shall complete twenty-five hours of continuing legal education, consisting of twenty hours of immigration law and five hours of ethics.

Nunes's suspension shall be effective thirty days from the filing of this opinion so that Nunes can close out his practice and protect the interests of existing clients. If Nunes notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Nunes shall accept no new business from the date this opinion is filed until the suspension is completed.

Pursuant to the provisions of Rule Regulating The Florida Bar 3-5.1(g) upon receipt of this order of suspension, Nunes shall forthwith furnish a copy of the order to all his clients with matters pending in his practice. Furthermore, within thirty days after receipt of this order, Nunes shall furnish staff counsel of the Bar with a sworn affidavit listing the names and addresses of all clients who have been furnished copies of the order. Judgment for costs in the amount of $2,751.08 is hereby entered in favor of The Florida Bar against Nunes, for which sum let execution issue.

It is so ordered.

KOGAN, C.J., and OVERTON, SHAW, GRIMES, HARDING, WELLS and ANSTEAD, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THIS SUSPENSION.

APPENDIX II

DATE: September 27, 1995

Gloria Monica Burton
c/o David S. Nunes, ESQ.
3917 North Andrews Avenue
Fort Lauderdale, Florida 33309

FILE NUMBER: A35-723-067
BENEFICIARY: BURTON, Mark Antonio

NOTICE OF INTENT TO REVOKE

This is in reference to a Petition for Alien Relative (Form I-130) which you filed on November 22, 1993 in behalf of the beneficiary. The petition was approved by this Service on January 26, 1994 and forwarded to the Department of State for processing and for consideration of the issuance of an immigrant visa to the beneficiary.

Our office received notification, through the Department of State's National Visa Center, that the beneficiary was found ineligible for an immigrant visa. The Consular Officer at the American Embassy in London returned your petition and supporting documents to this office for further disposition. The beneficiary was refused an immigrant visa in accordance with Title 8, Code of Federal Regulation, Section 212(a)(2)(A)(i)(II). This section relates to classes of excludable aliens who are ineligible to receive visas and who shall be excluded from admission into the United States. Section 212(a)(2)(A)(i)(II) states:

> "(i) In general. --Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential element of--
>
> (I) a crime involving moral turpide (other than a purely political offense), or
>
> (II) a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section

102 of the Controlled Substances Act (21 U.S.C. 802), is excludable.

As there is no waiver for the above stated regulation, the beneficiary was not issued an immigrant visa by the American Embassy.

Pursuant to Title 8, Code of Federal Regulations, Part 205.2, we hereby service notice upon you of our intent to revoke the approval of the petition. You are granted thirty (30) days from the date of

this letter in which to submit to this office evidence in support of the petition and in opposition to the revocation. A final decision will then be made.

If you should file a response, please refer to the above file number.

Sincerely yours,

/s/

James J. Barzynski
Acting Director

JMB/8

UNITED STATES DEPARTMENT OF JUSTICE
U.S. IMMIGRATION AND NATURALIZATION SERVICE
TEXAS SERVICE CENTER
DEPARTMENT A
POST OFFICE BOX 152122
IRVING, TEXAS 75015-2122

IN THE MATTER OF:

Gloria Monica Burton,

Petitioner,

Mark Burton,

Beneficiary, #A35 723 067

_____/

PETITIONERS RESPONSE TO NOTICE OF INTENT TO REVOKE

Comes now the petitioner Gloria Monica Burton by and through the undersigned attorney and file this her Response to the Service Notice of Intent to Revoke and states the following:

1. The petitioner is not seeking any relief under Section 212 (a) 2 (A) (i) (II) of the INA. Nor is he seeking a visa waiver under section 212(H) of the INA.

2. That the filing of her petition for alien relative (Form 1-130) and the filing of the Form 230 for the beneficiary is only a vehicle being utilized to restore jurisdiction to the Consular Officer at the American Embassy in London. The relief being sought is the reinstatement of the beneficiary I-551 following which the beneficiary will be seeking to Challenge the grounds for exclusion (possession of drugs).

3. That since the beneficiary was not deported as an aggravated felon he would only need to have been out of the country for five (5) years.

4. That he was deported as a youth under the State Youthful Offenders Statue which possibly could give rise to the exception in 212 (a) 2 (A) (i) (II)

5. That it should be noted that the beneficiary

Mark Burton first entered the United States at the age of twelve (12) in 1979 as the dependent child of Gloria Burton (f-4) principal beneficiary under the INA. That the 1990 Act relative to aggravated felon cannot be made applicable to the beneficiary. It should be noted that in the State of Florida possession of 27 grams of cocaine is simple possession and probation is available while the possession of 28 grams of cocaine probation is not available since that charge will be trafficking in cocaine which

carries three (3) years minimum mandatory. The beneficiary was placed on probation and sentenced to probation as a youthful offender and not as an aggravated felon and has been out of the United Stated for a period of 5 years; as such the exception in 212(a) 2(A) (i) (II) which was carefully left out of the Notice of Intent to Revoke should have been applicable.

YOUNG MARK BURTON STORY

Although the services do not usually go behind the conviction, in the beneficiary case the inception of the criminal charges is very important. He had ineffective assistance of counsel, in that he was advised to plead guilty to the charge and that he would have been simply placed on probation.

Florida Rules of Criminal Procedure mandate that before the court could have accepted the plea, Mark Burton should have been advised that in accepting that plea he would be subject immediately to deportation. He was denied due process since neither the court nor his attorney advised him of this very important aspect in the plea negotiation and in essence he accepted two sentences which was not a part of his agreement.

A. The state sentenced plus INA highest penalty DEPORTATION.

B. That two (2) or three (3) years later he is now before the Immigration Judge. Having admitted the conviction, deportation was conceded. That since Mark Burton had over seven (7) consecutive years of lawful permanent residence, had show rehabilitation, if he should be deported nine (9) years after his initial entry it would have created great hardship both to himself and his American citizen mother and as such he was eligible for 212 (c) relief. The harm that was trying to be prevented has now manifested itself.

C. That Mark Burton before the immigration judge was given two options and not being properly advised by counsel he made the wrong decision. He was apparently told that although the 212(c) waiver was available, that hearing usually takes at least 2 1/2 hours, as such his trial date would be at least

six (6) months away, during which time he would have to remain incarcerated. His alternative at that time would be to leave the country for five (5) years following and apply for reentry after five years. As a youngster he though he was choosing the simplest way out, which he could reapply to enter the United States.

D. That after the 5 years following his deportation he is now faced with a third sentence BANISHMENT FROM UNITED STATES.

6. The courts are split in their decision that once eligibility for INA 212(c) relief is established the relief survives the

finding for deportability.

7. Mark Burton case may be a case of first impression. Had he been given Effective Assistance of Counsel, young Burton could have shown that he was eligible for a INA 212(c) waiver for the conviction under which he is now being excluded to wit (possession of drugs.)

That an immigration judge and the BIA have the power in either exclusion or deportation proceedings, to grant NUNC PRO TUNC permission to reapply for admission following deportation, when the grant will dispose of the alien's inadmissibility at the time of her or his last entry and thereby effect a complete disposition of the case. See Re M-C. (1961, BIA) 91 & N Dec 280:

The Consular Officer at the American Embassy in London also noted in his letter of November 7, 1994 to the undersigned that young Burton is desirous of applying for Discretionary Relief as a exclusionable alien under INA Section 212(c). To do this Mark Burton should file an application to the nearest INA Center for seeking relief challenging the grounds of exclusion (possession of drugs.)

Mrs. Burton is a naturalized American Citizen and Mark Burton is a first preference son as such a visa is immediately available to him. If the service reapprove the petition for alien relative, the Consular Officer could reinstate the I-551 (NON PRO TUNC) hereby reinstating Mark Burton status as a lawful permanent resident. Mark Burton would thereby be permitted to file his application For Advanced Permission to Return to Unrelinquished Domicile (Form 1-191). Thereafter filing a Motion to Reopen he would be able to seek the 212(c) relief which would be dispositive of his case, since the only ground for his inadmissibility (possession of drugs) would thereby be eliminated. INA 212(c) (8 USCS 1182 (c) permits a waiver of a ground of inadmissibility to a permanent resident alien in a deportation preceding regardless of whether the alien departs the United States following the acts which render him or her deportable. See: Re Granados (1979, BIA) 16 I & N DEC 726.

CONCLUSION

Mark Burton has met all the favorable factors of outstanding Equities and Rehabilitation. See: In Re Marin (1978, BIA) 16 I & N Dec 581; Re Wadud (1984, BIA) 19 I & N Dec 182 and see: Re Edwards 1990, BIA) I & N Interim Dec No 3134 that since the Consular Officer of the American Embassy in London has jurisdiction to adjudicate Mark Burton I- 551 through the filing of his 212(H) (adjustment of status) he should be protected under the United States Constitution to wit: cruel and inhuman punishment, equal protection, due process and the Family Unity Act. Gloria Burton petition should therefore be given favorable discretionary relief and should not then be revoked.

Respectfully submitted,

LAW OFFICE OF DAVID S. NUNES, P.A.

BY: /s/

DAVID NUNES, Pro Se
3917 North Andrews Avenue
Ft. Lauderdale, FL 33309
Tel. No.: (305) 561-2023
Florida Bar No.: 305758

Copy to: Gloria Burton

THE UNITED STATES OF AMERICA

Receipt Number	Case Type I130 IMMIGRANT PETITION FOR RELATIVE, FIANCE(E), OR ORPHAN	
SRC-94-035-51361		
Receipt Date	**Priority Date**	**Petitioner**
July 16, 1996	November 22, 1993	BURTON, GLORIA M.
Office Date	**Page**	**Beneficiary**
July 16, 1996	1 of 1	BURTON, MARK A.

DAVID S. NUNES
3917 NORTH ANDREWS AVENUE
FORT LAUDERDALE FL 33309

Notice Type: Approval Notice
Section: Unmarried child (age 21 or older) of U.S. Citizen, 201(a)(1) INA

The above petition has been approved. We have sent the original visa petition to the **Department of State National Visa Center (NVC), 32 Rochester Avenue, Portsmouth, NH 03801-2909**. NVC processes all approved immigrant visa petitions that need consular action. It also determines which consular post is the appropriate consulate to complete visa processing. NVC will then forward the approved petition to that consulate.

This completes all INS action on this petition. If you have any questions about visa issuance, please contact the NVC directly. The telephone number to NVC is **(603) 334-0700**.

The NVC will contact the person for whom you are petitioning concerning further immigrant visa processing steps.

THIS FORM IS NOT A VISA NOR MAY IT BE USED IN PLACE OF A VISA.

Please see the additional information on the back. You will be notified separately about any other cases you filed.

IMMIGRATION & NATURALIZATION SERVICE
TEXAS SERVICE CENTER
POST OFFICE BOX 152122 - DEPT A
IRVING, TEXAS 75015-2122
Customer Service Telephone: (214) 767-7769

797 (Rev. 09/07/93)N

APPENDIX III

UNITED STATES DISTRICT COURT FOR THE ELEVENTH DISTRICT OF THE UNITED STATES

DAVID SMITH NUNES,

Petitioner,

vs.

THE FLORIDA BAR,
Respondent.
_____/

Case No.96-1119
Lt 96-6960

EMERGENCY PETITION FOR REVIEW AND STAY

The Petitioner, DAVID SMITH NUNES, shows the following:

1. That the Petitioner has been suspended by the Supreme Court of Florida, and that this court pursuant to its order to show cause dated July 25, 1995 in the above styled case stated: "It is ordered that unless said attorney files a response within 14 days from the date of this order, said attorney shall reciprocally be suspended from practice before this Court." A timely response was made.

2. That subsequent thereto having received exculpatory evidence which would exonerate the Petitioner to wit, reapproval of a relative petition which would reinstate the green card of the Burton child, thereby causing the Florida Bar's complaint to be without merit. Petitioner filed for a

temporary injunction for an emergency stay in the court below. In the event that the injunction would have been granted, there would have been no prejudice to the Florida Bar. But the denial has grossly prejudiced the Petitioner.

3. The Petitioner now finds himself in a dilemma to wit; the Supreme Court of Florida having suspended his license for a violation of Federal Rules of Criminal Immigration Procedure, the Petitioner would suggest that the Rules of Criminal Immigration Procedure were not violated. And pursuant to The Florida Bar v. Penn,

> While admission to practice before federal court is derivative from membership in State Bar, suspension or disbarment by state does not result in automatic suspension or disbarment by federal court without some affirmative action by federal court. 421 So.2d 497 (Fla. 1982). The Federal Court has now to act affirmatively.

In the expedience of judicial economy the Petitioner is attaching a composite of prior pleadings before the Florida Bar, the Supreme Court of Florida, and the District Court. The Court's attention is being drawn to the correspondence received from the Federal Government and which were attached as Petitioner's Exhibits before the Supreme Court of Florida.

Pursuant to the United States Constitution and

he Sovereign State of Florida, **no man should be deprived of life, liberty and the pursuit of happiness unless his guilt is beyond and to the exclusion of a reasonable doubt.** The Petitioner's wife and family are suffering from his loss of livelihood on the accusation that he could not possibly have succeeded in winning the cases, using the methods that he utilized; when in fact he was ultimately successful.

The emergency nature of the relief being sought is that one of the requirements of the Supreme Court of Florida is that the Petitioner notify all of his clients of his incompetency, and 96% of his professional employment entails Federal Immigration Practice.

WHEREFORE, the Petitioner would request the following relief:

A. Reversal of the lower trial court ruling.

B. An emergency stay of his suspension order of the Supreme Court of Florida.

C. At a minimum, a stay of the Federal Court's granting reciprocity by honoring the order of the Supreme Court of Florida prior to a full hearing being held in which the Petitioner could be fully allowed to present his case and the newly discovered

evidence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appeal was furnished by U.S. Mail this 21st day of August, 1996 to Ronna Friedman Young, Esquire, The Florida Bar, 5900 N. Andrews Avenue, Suite 835, Ft. Lauderdale, Florida 33309; and John A. Boggs, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, and The Supreme Court of Florida, Supreme Court Bldg., 500 S. Duval St., Tallahassee 32399, United States Court of Appeals for the Eleventh Circuit, 56 Forsyth Street, NW Atlanta Georgia 30303.

Maurice Graham
Attorney for Petitioner
331 East Prospect Rd.
Oakland Park, FL 33334
(954) 491-3737
Bar No. 180781

By :_____/s/_____
Maurice Graham

RECEIVED SEP 17 1996

SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	*	THURSDAY, SEPTEMBER 12, 1996
	*	
Complainant,	*	
	*	
v.	*	
	*	CASE NO. 85,451
DAVID SMITH NUNES,	*	
	*	
Respondent.	*	

* * * * * * * * * * * *

Respondent's Motion for Rehearing, Emergency Motion for Stay of Suspension Order and Motion to Reopen Hearing Before Referee filed in the above cause is hereby denied.

OVERTON, SHAW, GRIMES, HARDING and WELLS, JJ., concur KOGAN, C.J. and ANSTEAD, J., dissent

A True Copy

TEST:

Court Seal

/s/
Sid J. White
Clerk, Supreme Court

TC
cc: Ms. Ronna Friedman Young
Mr. John A. Boggs
Mr. Peter Ticktin

APPENDIX IV

Int. Dec. 3213, 20 I&N Dec.___(1993)
Interim Decision #3213
20 I&N Dec.

MATTER OF GABRYELSKY

A-13960837

Decided by Board November 3, 1993

(1) A waiver under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (Supp. IV 1992), may be used in conjunction with an application for adjustment of status by an alien who is deportable for both drug and weapon offenses; thus a lawful permanent resident alien who has been convicted of a weapons violation is not eligible to apply for adjustment of status and may concurrently apply for section 212(C) relief to waive his deportability arising from his drug conviction.

(2) Under the regulations at 8 CFR § 2451(e) (1993), an alien may concurrently apply for adjustment of status and section 212(C) relief.

(3) An applicant for adjustment of status is not precluded from concurrently applying for a waiver of admissibility under section 212(c) of the Act to waive another deportable offense, even though section 212(C) of the Act would not separately and independently waive all grounds of deportability.

CHARGE:

Order: Act of 1952 - Sec. 241(a)(2)(B)(i) [8 U.S.C. S 1251 (a)(2)(B)(i)] - Convicted of controlled substance violation.

Sec. 241(a)(2)(C) [8 U.S.C. S 1251 (a)(2)(C)] - Convicted of firearms violation.

ON BEHALF OF RESPONDENT:

Ramsey Clark, Esquire
Lawrence W. Schilling, Esquire
36 East 12th Street
New York, New York 10003

ON BEHALF OF SERVICE:

David M. Dixon
Appellate Counsel

BY: Milhollan, Chairman; Dunne, Morris, Vacca, and Heilman, Board Members

The Respondent has appealed from the decision of the immigration judge dated February 5, 1993, finding the respondent deportable as charged, denying his requests for adjustment of status under section 245(a) of the Immigration and Nationality Act, 8 U.S.C. § 1255(a)(1988), and a waiver of inadmissibility under Sec. 212(c) of the Act, 8 U.S.C. § 1182(c) (Supp, IV 1992), and ordering him deported from the United States. The appeal will be sustained.

The respondent is a native and citizen of Poland, (n.1) who was admitted to the United States at New York, New York, on December 20, 1965, as a refugee when he was 14 years old. His status was adjusted to that of a lawful permanent resident on March 26, 1968. On November 14, 1988, he was convicted in the Superior Court of California, Tehama County, of possession of a firearm, a machine gun, and possession of a silencer in violations of sections 12220, 12500, and 12520 of the California Penal Code. Also on that date and in that court, the respondent was convicted of the offense of manufacture of a controlled substance, methamphetamine, in violation of section 11379.6 of the California Health and Safety Code. Although he was sentenced to 5 years of imprisonment, the respondent served less than 5 years of imprisonment for his convictions. In addition, the respondent indicated in his application for adjustment of status that he was also convicted of malicious mischief, and of driving under the influence on two occasions.

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n.1 The respondent claims his citizenship was revoked by the Polish Government after his parents escaped from that country in 1963.

At his hearing before the immigration judge, the Respondent requested the opportunity to apply for adjustment of status under section 245 of the Act in conjunction with a waiver of inadmissibility under section 212(c) of the Act. The immigration judge denied his requests, reasoning that the respondent was not separately eligible for adjustment of status and section 212(c) relief, and he could not "bootstrap" eligibility from one form of relief to the other. On appeal, the respondent argues that the immigration judge erred by denying his request for adjustment of status in conjunction with the application for section 212(c) relief. The respondent claims the immigration judge improperly determined that he was statutorily ineligible for adjustment of status and section 212(c) relief.

Based on the respondent's admissions at his hearing and the records pertaining to his convictions that were presented by the Service, we agree that deportability has been established by the clear, unequivocal, and convincing evidence required by Woodby v. INS, 276 U.S. 385 (1966), and 8 CFR § 242.14(a)(1993) to support the order of deportation.

We reject the respondent's claim that the immigration judge erred in ordering him deported while his petition for habeas corpus is pending in the United States District Court for the Eastern District of California. The fact that the respondent may be attempting to collaterally attack his convictions does not affect his present deportability. See generally Matter of Khalik, 17 I&N Dec. 518(BIA 1980); Matter of Fortis, 14 I&N Dec. 576(BIA 1974); Matter of Sirhan, 13 I&N Dec. 592(BIA 1970). An alien cannot collaterally attack the legitimacy of a criminal conviction in a deportation or exclusion proceeding. See Trench v. INS, 783 F.2d 181 (10th Cir. 1986); Zinnanti v. INS, 651 F.2d 420 (5th Cir. 1981); The pendency of post-conviction motions or other forms of collateral attack, not constituting direct appeals, do not serve to negate the finality of the conviction or the charge of deportability, unless and until the conviction has been overturned pursuant to such a motion. Okabe v. INS, 671 F.2d 863 (5th Cir. 1982); Aguilera-Enriquez v. INS, 516 F.2d 565 (6th Cir. 1975), cert. denied, 423 U.S. 1050 (1976). We therefore conclude that the respondent's convictions

are final and fully sustain the charges of deportability.

We find merit however to the respondent's assertions that the immigration judge erred in finding the respondent ineligible for adjustment of status and in concluding he could not combine the remedies of adjustment of status under section 245(a) of the Act, since he is statutorily eligible for that relief. (N.2) Section 245(a) of the Act provides for the adjustment of status, in the discretion of the Attorney General, of an alien who was inspected and admitted or paroled into the United States if: (1) the alien makes an application for adjustment, (2) an immigrant visa is immediately available to him at the time his application is filed, and (3) the alien is eligible to receive an immigrant visa and is admissible for permanent residence.

N.2 The fact that the respondent has been a lawful permanent resident does not preclude him from applying for adjustment of status. See Tibke v. INS, 355 F.2d 42 (2d Cir. 1964); Matter of Parodi, 17 I&N Dec. 608, 611(BIA 1980).

The record reflects that the respondent was admitted to this country in 1965, and with respect to the first prerequisite, he has submitted an Application for Permanent Residence (Form I-485). Concerning the second requirement, the respondent's evidence, i.e., his Petition to Classify Status of Alien for Issuance of Immigrant Visa (Form I-130) and Application for Advance Permission to Return to Unrelinquished Domicile (Form I-191), indicate that he is the unmarried son of a United States citizen. He thus falls within the first-preference family visa category. See section 203(a)(1) of the Act, 8 U.S.C. § 1153(a)(1)(Supp. IV 1992). A visa petition filed on his behalf has been approved, and an immigrant visa would be immediately available to him, since first-preference visa numbers are now current. See Department of State Visa Bulletin, Vol. VII, No. 26 (Aug. 1993); see also Matter of Rainford, Interim Decision 3191, at 3 (BIA 1992).

In regard to the third statutory requirement, we point out that while the Respondent's conviction for possession of a firearm establishes his deportability under section 241(a)(2)(C) of the Act, see Matter of Chow, Interim Decision 3199 (BIA 1993), it does not render him admissible for purposes of section 245 adjustment, as there is no corresponding exclusion ground. In Matter of Rainford, supra, the Board specifically held that a conviction for criminal possession of a weapon did not preclude a finding of admissibility in connection with an application for adjustment of status under section 245 of the Act, because it is not a ground of excludability. Further, although the respondent's controlled substance conviction does render him inadmissible under section 212(a)(2)(A)(i)(II) of the Act, he may utilize section 212(c) of the Act for the limited purpose of waiving this ground. See generally Matter of Hernandez-Casillas. Interim decision 3147, at 32-33 n.6 (BIA 1990; A.G. 1991), affd, 983 F.2d 231 (5th Cir. 1993).

Section 212(c) of the Act provide that aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of 7 consecutive years, may be admitted in the discretion of the Attorney General without regard to certain specified grounds of exclusion enumerated in section 212(a) of the Act. The respondent is statutorily eligible to apply for this waiver insofar as he is a lawful permanent resident who apparently has maintained a lawful unrelinquished domicile in this country for 7 consecutive years. See section 212(c) of the Act, Matter of Edwards, Interim Decision 3134, at 5-6 (BIA 1990).

Although the statute describes a waiver under section 212(c) of the Act which is available to aliens seeking to eliminate a ground of inadmissibility upon application to enter the United States, it has been interpreted to include availability for relief in deportation proceedings as well as where the alien has not departed from the United States subsequent to the acts that rendered him excludable. See Francis v. INS, 532 F.2d 268 (2d Cir. 1976); Matter of Granados, 16 I&N Dec. 726 (BIA 1979);

Matter of Hom, 16 I&N Dec. 112 (BIA 1977), modified, Matter of Wadud, 19 I19 I&N Dec. 182N Dec. 182 (BIA 1984); Matter of Silva, 16 I&N Dec. 26 (BIA 1976); see also Matter of Hernandez-Casillas, supra.

The immigration judge properly determined that the respondent could not use section 212(c) of the Act to waive deportability for his firearms conviction. An alien deportable on the basis of a firearms conviction is ineligible for relief under section 212(c) because there is no exclusion ground corresponding to the deportation ground for conviction of a firearms offense. See Matter of Chow, supra; Matter of Hernandez-Casillas, supra; Matter of Granados, supra. But see Bedoya-Valencia v. INS, 6 F.3d 891 (2d Cur, 1993) (extending Francis rule to entry without inspection charge where there could not conceivably be an analogous ground of exclusion, and allowing application for section 212(c) relief). We reject the respondent's claim that his weapons conviction could be a constituent of a section 212(a)(2)(B) ground of excludability (multiple criminal convictions) when combined with his convictions for manufacture of a controlled substance and malicious mischief, which could be waived by section 212(c). In Matter of Montenegro, Interim Decision 3192 (BIA 1992), this Board followed the holdings of Matter of Wadud, supra, and Matter of Granados, supra, and rejected the expansion of section 212(c) to include cases where the ground of deportability charged is not also a ground of inadmissibility, even where the alien's conviction would also cause him to be excludable for having been convicted of a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act.

We find support, however, in the federal regulations for the respondent's use of section 212(c) of the Act in conjunction with his application for adjustment of status. The regulations at 8 CFR § 242.17(a)(1993), pertaining to the creation of the status of an alien lawfully admitted for permanent residence under sections 244(a), 245, or 249 of the Act, 8 U.S.C. §§ 1254(a), 1255, 1259 (1988 & Supp. IV 1992), provide in pertinent part:

In conjunction with any application for

> creation of status of an alien lawfully admitted for permanent residence made to an immigration judge, if the respondent is inadmissible under any provision of section 212(a) of the Act and believes he meets the eligibility, he may apply to the immigration judge for such waiver.

We specifically note that an alien may apply for both adjustment of status and section 212(c) relief. The regulations at 8 CFR § 245.1(e)(1993) provide:

> Concurrent applications to overcome exclusionary grounds. Except as provided in parts 235 and 249 of this chapter, an application under this part shall be the sole method of requesting the exercise of discretion under section 212(g),(h),(i), and (k) of the Act, as they relate to the excludability of an alien in the United States. Any applicant for adjustment under this part may also apply for the benefits of section 212(c) of the Act, for permission to reapply after deportation or removal under section 212(a)(17) of the Act, and for the benefits of section 212(a)(28)(I)(ii) of the Act. No fee is required for filing an application to overcome the exclusionary grounds of the Act if filed concurrently with an application for adjustment of status under the provisions of the Act of October 28, 1977, and of this part. (Second emphasis added.)

This regulation, allowing requests for discretionary waivers of inadmissibility under sections 212(g), (h), and (i) of the Act by aliens in the United States, was first promulgated by the Commissioner of the Immigration and Naturalization Service as 8 CFR § 245.1(f) in 30 Fed. Reg. 14,778 (1965), and it was amended at 31 Fed. Reg. 2373 (1966), and the "Concurrent applications to overcome exclusionary grounds" heading and the sentence providing, "Any applicant for adjustment under this part may also apply for the benefits of section 212(c) of the Act and for permission to reapply after deportation or removal," were added. The regulation was also amended at 32 Fed. Reg. 9632

(1967) (adding benefits under section 212(a)(28), and at 43 Fed. Reg. 18,644 (1978) (adding last sentence pertaining to fee). In 1982, it was redesignated as 8 CFR § 245.1(d) at 47 Fed. Reg. 12,133 (1982) and revised at 47 Fed. Reg. 44,237 (1982). In 1987, it was redesignated in its current form at 8 CFR § 245.1(e). See 52 Fed. Reg. 6321 (1987).

Under the provisions of 8 CFR § 245.1(e)(1993), there is no requirement that section 212(c) of the Act separately and independently waive al grounds of deportability in order for an applicant for adjustment of status to concurrently apply for relief under sections 245 and 212(c), as argued by the Service. (n.3) Indeed, such a reading would render the regulation at 8 CFR § 245.1(e) (1993) meaningless, for there would be no need to concurrently apply for adjustment of status to overcome exclusionary grounds if a section 212(c) waiver would independently waive all grounds of inadmissibility. We note that Matter of Hernandez-Casillas, supra, the Attorney General concluded that although a lawful permanent resident deportable for entering the United States without inspection is ineligible for section 212(c) relief, discretionary relief under section 212(C) is otherwise available in deportation proceedings where the alien requests adjustment of status under section 245 of the Act. Id. at 32 n.6, 47 n.16. Citing Matter of Smith, 11 I&N Dec. 325 (BIA 1965), the Attorney General indicated that if the ground of deportation had been other than illegal entry, a remand might have been necessary to permit the respondent to seek adjustment of status under section 245 of the Act. Id. at 47 n.16, (n.4)

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n.3 We do not consider the instant case to be analogous to Matter of Roman, 19 119 I&N Dec. 855N Dec. 855 (BIA 1988). In Matter of Roman, we found the respondent could not establish combined eligibility for nunc pro tunc permission to reapply for admission and a waiver of inadmissibility pursuant to section 241(f) of the Act, where she was not separately eligible for either form of relief. The alien could not "bootstrap" eligibility from one

waiver to the other since she would not be eligible for either form of relief without the other waiver having first been granted. In the instant case, the respondent does not need to have his status adjusted to that of a lawful permanent resident before he is eligible to apply for a waiver under section 212(c) of the Act; he is already a lawful permanent resident. In the adjustment of status context, a respondent can apply for several waivers, such as under sections 212(c), (g), (h) and (i) of the Ac, in conjunction with his application for adjustment of status. See 8 CFR § 245.1 (e)(1993).

n.4 In Matter of K-L-, Interim Decision 3200 (BIA 1993), the Board noted that the respondent, who claimed eligibility for adjustment of status under section 245 of the Act, was not precluded from applying for that relief because of his firearms violation, but because he did not present evidence of an approved visa petition. We indicated that his inadmissibility as a drug trafficker under section 212(a)(2)(C) of the Act could not be waived under section 212(h), so he was ineligible for relief. By contrast, in the instant case the respondent is a lawful permanent resident who can use section 212(c) of the Act to waive his inadmissibility under section 212(a)(2)(A)(i)(II).

While we note that the regulation now at 8 CFR § 245.1(e)(1993) was promulgated before Francis v. INS, Supra, (expanding section 212(c) relief to deportable aliens who have not temporarily departed from the United States), and Matter of Silva, supra, we are not persuaded by the Service's contention that these cases have mooted the applicability of this regulation and Matter of Smith, supra. There is no basis to ignore this regulation on the Service's theory that it is moot. It is a valid, properly promulgated, currently applicable regulation and cannot simply be disregarded.

We note that the respondent is not ineligible

for adjustment of status as a result of the weapons offense, and he would not be deportable as a result of the conviction if his status is adjusted to that of a lawful permanent resident. See Matter of Rainford, supra. In Matter of Rainford we rejected the futility doctrine described in Matter of V-, ii I&N Dec. 293 (BIA 1942), (that it would be futile to admit someone only to have him immediately become subject to deportation) in the adjustment of status context. Thus, we held that the alien's conviction for criminal possession of a weapon did not bar him from adjustment of status to that of a lawful permanent resident. Consequently, we conclude that on the basis of the regulation at 8 CFR § 245.1(e) (1993), the respondent in the instant case is eligible to apply for section 212(c) relief in conjunction with adjustment of status, notwithstanding his weapons convictions.

Having found that the respondent is admissible to the United States and therefore eligible to apply for adjustment of status, as well as for section 212(c) relief, we will remand the case to the immigration judge to allow the respondent to present his applications for relief. (n.5) We note that to be granted adjustment of status and section 212(c) relief, the respondent will also have to show the immigration judge that he merits the granting of relief in the exercise of discretion. Finally, visa numbers for first-preference classification will still need to be current.

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n.5 In light of our determination in this case, we need not address the other issues raised by the respondent on appeal.

ORDER: The appeal is sustained and the record is remanded to the immigration judge for further proceedings in accordance with the foregoing opinion and for entry of a new decision.

MATTER OF CHAVEZ-CALDRON

In Deportation Proceedings

A-29489499

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail this ____ day of February, 1997 to **Ronna Friedman Young, Esquire**, The Florida Bar, 5900 N. Andrews Avenue, Suite 835, Ft. Lauderdale, Florida 33309; **John T. Berry, Esquire,** The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; **John F. Harkness, Jr., Esquire**, Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; and **John A. Boggs, Esquire**, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.

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By:_____
Maurice Graham